

ISSUE DATE: September 23, 1999

DOCKET NO. P-495/D-98-1438

ORDER GRANTING VARIANCE

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
Marshall Johnson  
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Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Request of Metropolitan  
Fiber Systems to be Exempt from the  
Requirement to File a Depreciation Study

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**PROCEDURAL HISTORY**

On June 16, 1989, the Commission granted Metropolitan Fiber Systems (MFS or the Company) a certificate of authority to provide special access service in Minnesota.

On March 9, 1999, the Commission issued an Order approving the Company's request for a variance from the Commission's rule requiring annual depreciation filings. The Commission required MFS either to file a depreciation study by July 1, 1999, or, in the alternative, to submit another filing that would remove the requirement to file a depreciation study.

On June 17, 1999, MFS filed a request for a Commission determination that MFS is a "local niche provider," as defined by Minnesota Rules, part 7812.0100, subp.32. That definition places a local niche provider under the overall heading of "telecommunications carrier" in Commission statutes and rules. Telecommunications carriers are exempt from the requirement to file annual depreciation studies. MFS asked the Commission to determine that MFS need not file a depreciation study, or to amend the Company's certificate of authority to clarify its status as a telecommunications carrier.

On July 15, 1999, the Department of Public Service (the Department) filed comments in support of MFS's petition. The Department recommended that the Commission reissue the Company's certificate of authority as a telecommunications carrier providing local niche service and thus exempt from annual depreciation filing requirements.

On September 14, 1999, the matter came before the Commission for consideration.

## **FINDINGS AND CONCLUSIONS**

### **I. RELEVANT STATUTES AND RULES**

Minn. Rules, part 7812.0100, subp. 32, provides the following definition of “local niche service provider”:

“Local niche service provider” means a telecommunications carrier that provides local niche service pursuant to a certificate of authority granted by the commission.

A telecommunications carrier is defined in Minn. Stat. § 237.01, subd. 6. That subdivision states in relevant part:

“Telecommunications carrier” means a person, firm, association, or corporation authorized to furnish one or more of the following telephone services to the public, but not otherwise authorized to furnish local exchange service: (1) interexchange telephone service; (2) local telephone service pursuant to a certificate granted under the authority of section 237.16, subdivision 4, before August 1, 1995; or (3) local service pursuant to a certificate granted under section 237.16, for the first time after August 1, 1995, except if granted to a successor to a telephone company otherwise authorized to furnish local exchange service.

Minn. Stat. § 237.22 sets requirements for depreciation and amortization for telephone companies:

#### **237.22 DEPRECIATION; AMORTIZATION**

The commission shall fix proper and adequate rates and methods of depreciation and amortization with respect to telephone company property and every telephone company shall conform its depreciation accounts for property used in whole or in part to provide non-competitive services to the rates and methods fixed by the commission.

However, Minn. Stat. § 237.035 (e) exempts telecommunications carriers from the depreciation requirements of Minn. Stat. § 237.22:

(e) ....a telecommunications carrier’s local service is subject to this chapter except that:

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(2) a telecommunications carrier is not subject to section 237.22

## II. COMMENTS OF THE COMPANY AND THE DEPARTMENT

MFS stated that it, like other Competitive Access Providers (CAPs), is a local niche service provider under the Commission's rules. Unlike other CAPs, however, MFS is not certified as a telecommunications carrier under the definition in Minn. Stat. § 237.01, subd. 6. MFS stated that the distinction is one of form, not substance: MFS is the only CAP that applied for a certificate of authority before the current law designated new local service providers certified *after* August 1, 1995 as telecommunications carriers. MFS argued that the Commission not only can, but must, remove this discriminatory and arbitrary distinction between its status and that of other CAPs. MFS suggested that the Commission could end the discriminatory treatment by reaffirming or amending MFS's certificate to clarify the Company's status as a local niche service provider certified *after* August 1, 1995. MFS would thus be subject to the same regulatory treatment as other CAPs, including an exemption from annual depreciation requirements.

The Department stated that MFS continues to meet all requirements for certification under Minn. Stat. § 237.16, subd. 1(b). MFS's requirement to file a depreciation study does not reflect either the current legal or competitive environment, and should therefore not apply. The Department argued that MFS functions as a telecommunications carrier/local niche provider, provides the same private line and special access service as other local niche service providers, and should not be subject to the burden of filing a depreciation study when other CAPs are not. The Department recommended exempting MFS from the depreciation filing requirement by reissuing MFS's certificate of authority as a telecommunications carrier providing local niche services.

## III. COMMISSION ACTION

The Commission accepts the logic of the Department and MFS: MFS is functionally a telecommunications carrier/local niche service provider but has failed to come under these definitions because of an accident of timing (grant of a certificate prior to August 1, 1995). The Commission agrees with the Company and the Department that MFS should not be subject to the burden of preparing and filing an annual depreciation study when other telecommunications carriers/local niche service providers are not. However, reaffirming, reissuing, or amending the Company's certificate of authority will not bring the Company within the statutory definition of a telecommunications carrier—"a person, firm, association or corporation authorized to furnish one or more of the following telephone services to the public...(3) local service pursuant to a certificate granted under section 237.16, for the first time after August 1, 1995..." Minn. Stat. § 237.01, subd. 6. (Emphasis added).

The Commission will instead grant MFS a variance from Minn. Rules, part 7810.7700, which requires each telecommunications service provider to file annual depreciation studies. MFS's request for relief from depreciation filing requirements fits the three criteria for granting a rule

variance under the Commission's rules of practice and procedure. Minn. Rules, part 7829.3200. First, enforcement of the rule requiring MFS to continue annual depreciation filings would impose an excessive burden upon the Company by placing a greater financial burden upon the Company than is placed upon its competitors. Second, granting the variance would not adversely affect the public interest because current statutes do not contemplate the need for local niche service providers to prepare and submit annual depreciation filings. Third, granting the variance would not conflict with standards imposed by law.

The Commission is granting MFS a variance from the depreciation filing rule because MFS's service parallels that of other telecommunications providers that would be exempt from the rule. Since MFS's status and certification are unlikely to change, the Commission will grant the variance on an ongoing basis. The variance will not presumptively expire in one year, as a variance normally would under Minn. Rules, part 7829.3200, subp. 3. However, should MFS's status or circumstances change, requiring a modification or revocation of the variance, the Commission remains free to reopen consideration of the variance.

### **ORDER**

1. The Commission grants MFS an ongoing variance from Minn. Rules, part 7810.7700, to exempt the Company from the requirement to file depreciation studies.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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